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# THE UNAUTHORIZED PRACTICE OF LAW BY REALTORS IN FLORIDA— THE ST. PETERSBURG SUITS

LEONARD W. COOPERMAN\*

## INTRODUCTION

It is generally agreed that realtors cannot validly render opinions for others concerning the validity or marketability of titles to real property.<sup>1</sup> Likewise agreement exists that realtors cannot, with or without compensation, prepare or fill in for others forms of instruments in real estate transactions in which they do not act as brokers.<sup>2</sup>

Now a controversy is raging in Florida over the right of realtors to fill in forms of deeds, mortgages and the like in real estate transactions in which they act as brokers and for which service they make no charge additional to their brokers' commission. The emphasis in this article will be placed upon the present conflict.

## THE KEYES DECISION

In 1950, the Supreme Court of Florida apparently decided in *Keyes Co. v. Dade County Bar Association*,<sup>3</sup> that a realtor, corporate or individual, is to be restricted in the drafting and filling in of documents in real estate transactions handled as a broker to the preliminary contract, memorandum or deposit receipt recording the agreement of the parties to sell, buy or lease. The court reasoned that the real estate license law<sup>4</sup> authorizes a realtor to do work which is in its nature preliminary in negotiating any transaction which is calculated to or results in a sale, exchange or leasing of property. Thus, it impliedly authorizes such person to record the handiwork which entitles him to his compensation in a preliminary memorandum deposit receipt or contract evidencing the preliminary agreement of the parties. The court said:

Once this point is reached, the field is the lawyer's, and he then should do those things necessary to the consummation of the contract.

... The examination of abstracts, quieting of titles, the conduct of suits in ejectment and the like fall entirely within the sphere of the lawyer; and the preparation and execution of the instruments effectuating transfer should be under the lawyer's supervision, if the parties decide that they need expert advice and service.<sup>5</sup>

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1. *Grievance Committee v. Payne*, 128 Conn. 325, 22 A.2d 623 (1941); *Keyes Co. v. Dade County Bar Ass'n.*, 46 So.2d 605 (Fla. 1950); FLA. STAT. § 475.25(h) (1951); *State v. Ferguson*, 145 Ohio St. 12, 60 N.E.2d 476 (1945); *Union City v. Waddell*, 205 S.W.2d 573 (Tenn. 1947).

2. *Hulse v. Criger*, 247 S.W.2d 855 (Mo. 1952); *Grievance Committee v. Dean*, 190 S.W.2d 126 (Tex. Civ. 1945).

3. 46 So.2d 605 (Fla. 1950). The court said its consideration of the problem was "more or less in an abstract way".

4. FLA. STAT. c. 475 (1951).

5. *Keyes Co. v. Dade County Bar Ass'n.*, 46 So.2d 605, 606 (Fla. 1950).

To the argument made on behalf of the realtors that the conveyancing forms filled in after the preliminary agreement were mere copies of those prepared by an attorney, the court said:

We are not shaken in this view because of the argument that oft-times the instrument to be executed is a copy of one which has been prepared by an attorney. An instrument entirely adequate in one instance may be totally inadequate in another, and even if a particular form may be common to many transactions, it may not serve to effectuate the transfer if there are errors in the parties, the description, the signatures or the acknowledgment. It too often happens that one receives an instrument which is valid on its face, only to discover later that it has been ineffectual, and then finds himself put to expense to correct an error which could well have been avoided had he been properly advised at the outset.<sup>6</sup>

#### THE PROBLEM TODAY

The realtors of Florida have not accepted the *Keyes* decision as holding that the law prohibits them from drafting or filling in for others forms of deeds, mortgages, notes, leases, assignments, satisfactions and the like in transactions in which they act as brokers or salesmen. Their views and contentions are pointedly and aggressively presented in the intervention by the Florida and St. Petersburg Boards of Realtors and many individual realtors in current suits filed by the St. Petersburg Bar Association against two abstract companies for declaratory decrees and to enjoin what the plaintiffs in those suits conceive to be the unauthorized practice of law.<sup>7</sup> The Florida Bar also intervened in these suits, aligning itself with the plaintiffs.

In reply to the realtors' contentions, the bar association urged that the *Keyes* case has settled the matter against the realtors and their efforts now constitute merely an attempt to relitigate that case. To judge the merits of these contrary contentions it is necessary to pay attention to other language in the Supreme Court's opinion, which is the basis for the contention of the realtors, and also to give some consideration to the law established in other states.

#### THE VIEWS IN GENERAL

At the time of the decision in the *Keyes* case, the law in other states

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6. *Id.* at 607.

7. *Cooperman v. Guarantee Abstract Co.*, Ch. No. 37,759, 6th Cir. Fla. 1953; *Cooperman v. West Coast Title Co.*, Ch. No. 37,760, 6th Cir. Fla. 1953.

They contend in asking for a declaratory decree that they have a right to fill in forms of all instruments necessary to consummate any real estate transaction; that: (1) realtors over a long period of years have by custom filled in such forms and should be permitted to continue to do so; (2) that business will be stultified if such forms are required to be drafted or filled in by lawyers; (3) that lawyers have no monopoly on such practice and to give them one would create an illegal trade restraint in violation of the state anti-trust law and the public interest; (4) the filling in of forms of instruments by realtors in transactions in which they act as brokers is merely an incident of and ancillary to their lawful business and is not the unauthorized practice of law because of their interest in the transaction generated by the establishment and collection of their compensation for arranging the transaction; (5) the holding in the *Keyes* case does not prohibit them from such acts in transactions in which they participate as brokers or salesmen.

on the question was in conflict,<sup>8</sup> as it is now.<sup>9</sup> Summed up, the following propositions state the law and its philosophy in the conveyancing field:

1. Most courts take the view that the lawyer's exclusive province should include only the performance of those operations which not only are traditionally the lawyers, but which for the protection of organized society and the assurance of its efficient and economic operation should be performed only by lawyers. However, practically all the authorities, by either dictum or precise holding, agree that the drafting of instruments for other persons in the field of conveyancing is the practice of law, requiring a lawyer's services in such drafting as a requisite to public protection.<sup>10</sup>

2. The law recognizes that any person can in effect practice law for himself by preparing conveyancing instruments in those transactions in which he is sufficiently interested to be in practical effect a party or is a party. This, of course, is a corollary to the principle recognized by all courts that any person can represent himself in any transaction, although admittedly such acts if done by another for him would be the unauthorized practice of law.<sup>11</sup>

3. Some confusion has arisen in attempts by some courts to resolve the conflict which naturally arises in applying the interest theory and at the same time trying to reserve in the public interest the difficult phases of the conveyancing field to the lawyers, who presumably have the overall knowledge necessary to protect the public interests in both the simple and the complex phases of conveyancing. These courts have mistakenly treated the problem as one of degree, determined by the simplicity or complexity of the instruments involved. They have fused the interest theory with a

8. *E.g.*, *People v. Shafer*, 404 Ill. 45, 87 N.E.2d 773 (1949); *In re Gore*, 58 Ohio App. 79, 15 N.E.2d 968 (1937); *Commonwealth v. Jones & Robbins, Inc.*, 186 Va. 30, 41 S.E.2d 720 (1947), holding the filling in of forms of deeds, mortgages, etc. by realtors, even in transactions in which they act as brokers, is the unauthorized practice of law. *Contra*: *Cowern v. Nelson*, 207 Minn. 642, 290 N.W. 795 (1940); *Childs v. Smeltzer*, 315 Pa. 9, 171 Atl. 883 (1934).

9. *Hulse v. Criger*, 247 S.W.2d 855 (Mo. 1952), holding realtors may fill in standard forms of simple instruments in transactions where they act as brokers; *Washington State Bar Ass'n. v. Washington Ass'n. of Realtors*, 251 P.2d 619 (Wash. 1953), holding the filling in of a form warranty deed by a real estate broker is the unauthorized practice of law even in a transaction in which he acted as broker where the deed was made subject to two mortgages.

10. *People v. California Protective Corp.*, 76 Cal. App. 354, 244 Pac. 1089 (1926); *Boykin v. Hopkins*, 174 Ca. 511, 162 S.E. 796 (1931); *Re Matthews*, 57 Idaho 75, 62 P.2d 578 (1936); *People v. Schafer*, 404 Ill. 45, 87 N.E.2d 773 (1949); *State v. Richardson*, 125 La. 644, 51 So. 673 (1910); *Opinion of the Justices*, 289 Mass. 607, 194 N.E. 313 (1935); *Grand Rapids Bar Ass'n. v. Denkema*, 290 Mich. 56, 287 N.W. 377 (1939); *Fitchette v. Taylor*, 191 Minn. 582, 254 N.W. 910 (1934); *Clark v. Reardon*, 231 Mo. App. 666, 104 S.W.2d 407 (1937); *People v. Alfani*, 227 N.Y. 334, 125 N.E. 671 (1919); *People v. Title Guarantee & Trust Co.*, 227 N.Y. 366, 125 N.E. 666, *reversing* 180 App. Div. 648, 168 N.Y. Supp. 278 (1917), *rehearing denied*, 228 N.Y. 585, 127 N.E. 919 (1920); *Land Title Abstract & Title Co. v. Dworkin*, 129 Ohio St. 23, 193 N.E. 650 (1934); *Rhode Island Bar Ass'n. v. Automobile Service Ass'n.*, 55 R.I. 122, 179 Atl. 139 (1935); *Re Duncan*, 83 S.C. 186, 65 S.E. 210 (1909); *Union City Bar Ass'n. v. Waddell*, 205 S.W.2d 573 (Tenn. 1947); See Notes, 111 A.L.R. 19; 125 A.L.R. 1173; 151 A.L.R. 781.

11. *Gustafson v. Taylor & Sons, Inc.*, 138 Ohio St. 392, 35 N.E.2d 435 (1941); *Commonwealth v. Jones & Robbins, Inc.*, 186 Va. 30, 41 S.E.2d 720 (1947); *Washington State Bar Ass'n. v. Washington Ass'n. of Realtors*, 251 P.2d 619 (Wash. 1953).

resurrection of the previously discredited and impractical theory that the practice of law in this field can be dissected and classified into two phases: (1) those which are simple and require no great knowledge of law and (2) those which are complex and require a lawyer's services. A few courts, therefore, predicate decisions permitting laymen to do phases of conveyancing for others, where such laymen have an indirect interest in the transaction, mainly upon the simplicity of the instruments, rather than upon a decision on whether the interest of such laymen is direct enough in a transaction to permit them, in effect, to practice law for themselves.<sup>12</sup>

4. As applied to realtors, the real question presented is whether or not the interest of a realtor in a transaction, because of his right to a commission for effectuating the same, is sufficient and direct enough to enable him to do those things which would otherwise be the practice of law without being guilty of the unauthorized practice of law. There is a difference of opinion among the courts as to how far this interest of a realtor will permit him to go in this field. In some instances this difference of opinion exists because of the comity given by the courts to statutory provisions.<sup>13</sup>

In other instances the difference of opinion exists because of the confusion noted above, and in those cases the courts which permit realtors to prepare deeds, mortgages, etc. which are "simple" taking refuge in applying "common sense" instead of logic and reason, which would simply dictate a narrowing of the interest theory as a solution to the problem, as has been done by the better reasoned cases.<sup>14</sup>

The best reasoned cases limit the realtor's interest to the preliminary contract, because this fixes his right to a commission, and in the majority of instances he is a party to such a contract in a real sense, since either he is named as escrow agent therein to hold the initial deposit or his commission agreement is part and parcel of the same. Once the preliminary contract is signed his interest thereafter is not direct enough to permit him to draw the other instruments involved in consummating the transaction.<sup>15</sup> These cases recognize that if there is a sufficient interest in conveyancing either to make one a party to what he does or in practical effect a party, so that what he is doing is primarily for himself and not primarily representation of other persons, the law in principle does not and cannot limit activity to that which is simple and at the same time recognize, as it does, that a party can be his own lawyer with the right to do both the simple and the complex. Thus, recognition is given to the proposition that the emphasis should be not upon the simplicity or complexity of the instrument, but should be upon the sufficiency of the interest to determine and decide

12. *Hulse v. Criger*, 247 S.W.2d 855 (Mo. 1952); *Childs v. Smeltzer*, 315 Pa. 9, 171 Atl. 883 (1934).

13. *Cowern v. Nelson*, 207 Minn. 642, 290 N.W.795 (1940).

14. *Hulse v. Criger*, 247 S.W.2d 855 (Mo. 1952); *Childs v. Smeltzer*, 315 Pa. 9, 171 Atl. 883 (1934).

15. *Gustafson v. Taylor & Sons, Inc.*, 138 Ohio St. 392, 35 N.E.2d 435 (1941); *Commonwealth v. Jones & Robbins, Inc.*, 186 Va. 30, 41 S.E.2d 720 (1947).

realistically whether the representation is primarily of oneself, or predominantly that of others. The "difference in degree" which should be taken into account is in the interest, not the character of the instrument as being "complex" or "simple", when both kinds are conceded to be the practice of law if done for others by one without a real interest.

It is clear that those courts which emphasize the simple instrument theory as the main reason for their holdings that a realtor in transactions in which he acts as broker can prepare instruments subsequent to the sales contract, reach an impractical, contradictory and ridiculous result when they recognize, as they all do, that real estate brokers cannot prepare even "simple" instruments in transactions in which they do not act as brokers, thereby further recognizing, as they must, that even the preparation of "simple" instruments is the practice of law.

#### FLORIDA'S APPROACH

The Supreme Court of Florida apparently recognized the real problem in the *Keyes* case and placed the emphasis where it should be. It drew the line where the direct interest of the realtor ends, instead of attempting to draw it between simple and complex instruments. In this fashion, it applied the principle that a person can represent himself by limiting the realtor to the drafting of the preliminary agreement, and at the same time assured to the public the overall knowledge of the lawyer to be exercised in favor of the parties before transactions are consummated. It further recognized, in effect, that if the simplicity of the act to be done is the test to be applied in determining whether or not the act is the practice of law, then there is no reason, in principle, why the whole field of the practice of law including practice in the courts should not similarly be dissected into those phases which are simple and those which are complex, and thereby permit laymen to do the former. Wisely it prevented this and did so without question in the public interest.

#### THE REALTORS' CONTENTIONS REFUTED

With complete disregard of the legal principles involved, realtors have picked two sentences from the opinion in the *Keyes* case as conclusive evidence that the court did not intend to hold that they cannot draft or fill in forms of instruments subsequent to the preliminary contract if the parties want them to do so. First the court stated, "If the parties themselves wish a representative after the realtor has brought them together, they should select him from the Bar."<sup>16</sup> The realtors contend that this language is, in effect, merely advice to the parties to get a lawyer, but does not mean that a realtor cannot fill in forms or draft instruments. It is obvious that the court in using this language was giving effect to other statements in the opinion that the parties to a transaction themselves can do their own conveyancing and are not required to hire a lawyer. The court clearly did

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16. *Keyes Co. v. Dade County Bar Ass'n.* 46 So.2d 605, 606 (Fla. 1950).

not mean, in view of the boundary it established between the work of the realtor and that of the lawyer, that everything else it had said was subject to an additional condition that if the parties requested a realtor to practice law he could do so because of their request.

The realtors say also that the most important language in the *Keyes* case which indicates that the opinion was not intended to prohibit them from filling in forms, is as follows:

We realize that situations will arise from time to time where the boundary here attempted to be drawn will become indistinct, but if the general principle we have undertaken to announce be kept in mind, neither attorney nor realtor will infringe on the field of the other, and the interests of a member of the public who seeks expert advice in one of the fields, or both, will be safeguarded.<sup>17</sup>

It has been stated that if the Florida Supreme Court intended that a realtor be restricted to the drafting of the preliminary contract in the sale or exchange of real estate, that the above language would not have been used, because if the boundary between the work of the realtor and the work of the lawyer is the preliminary contract, it could never become indistinct. A careful analysis of the *Keyes* case clearly discloses the fallacy of this position. For instance, the court after analyzing the real estate license law, stated the following:

We have a very definite impression that the part of the realtor is in its nature preliminary *except* in a matter of appraisals and, *in some instances, rentals*, and that in most, *if not all cases*, certain steps must ultimately be taken before the transactions between those whom he represents and those with whom they deal may be consummated by the exchange of instruments permanent in their nature.<sup>18</sup> (Italics supplied).

The court thus recognized that in some transactions, particularly rentals, that a preliminary contract is not drawn and that in this type of situation "the boundary here attempted to be drawn will become indistinct."

It is significant to note at this point that the Florida Real Estate License Law<sup>19</sup> covers only sales, exchanges and leases of real property. It does not embrace within its terms mortgages of real estate or sales and exchanges of personal property, including businesses. Thus, there can be no sanction within its provisions for the drafting by a realtor of an agreement to mortgage or an agreement to sell a business or other personal property. So again, in these fields "the boundary here attempted to be drawn will become indistinct" because there is no statutory authority for the drafting by a realtor of the preliminary agreement to mortgage real or personal property, or to sell or exchange personal property, including businesses.

It might be said with some degree of logic that the court did not expressly rule on the right of a realtor to prepare a lease when no preliminary

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17. *Id.* at 607.

18. *Id.* at 606.

19. FLA. STAT. c. 475 (1951).

contract to lease is drawn. However, the court clearly stated the rule for what it termed to be *most cases*, which it illustrated with the typical situation of a bargain and sale of real estate where a preliminary contract is drawn to bind the purchaser. In these types of transactions the court said that after the preliminary contract is drawn and executed, "Once this point is reached the field is the lawyer's."<sup>20</sup>

#### THE ST. PETERSBURG SUITS

Despite the *Keyes* case and the principles above pointed out, the trial court in the St. Petersburg cases, *per Judge Wehle*, in a confused opinion ruled that realtors in transactions in which they act as brokers, without making a charge additional to their regular commission for effecting the deal, may prepare:

. . . standard forms of deeds, purchase money mortgages, mortgage notes, loan mortgages and leases, provided, however, that standard recognized blank forms for such instruments are used and that the broker, in completing such forms, inserts in them only such clerical details as the dates, amounts, names of parties, latest tax year liability and description of the property involved.

In addition to the specific limitations inherent in the quoted language, the court added the following additional limitation:

Where the circumstances require the stating of *further* or more complicated details, conditions, or terms, an attorney should prepare or supervise the preparation of such instruments.<sup>21</sup> (*Italics supplied*).

Judge Wehle admitted in effect that his decision was made not upon logic, but upon "common sense" and "public convenience". He reasoned that preliminary contracts are permitted to be prepared by realtors by some courts, including the Supreme Court of Florida, as a "practical adjustment to the realities of making a deal", and since it requires more knowledge of law to prepare a preliminary contract than is required for some of the subsequent instruments, courts which allow the preparation of the former by realtors for "public convenience" are justified in permitting them to prepare the latter and *should* permit this to be done. He further applied the interest theory by expressly prohibiting realtors from preparing any instruments in transactions in which they do not act as brokers. Thus, he extended the interest theory to instruments and terms which are "simple", but, contrary to the legal principles involved, at the same time limited its application so that "complicated" terms or instruments cannot be prepared by realtors. Emphasis was thus placed upon the character of the instrument involved as being "simple" or "complex" rather than upon a determination of whether or not the realtor's interest is direct enough in the instruments subsequent to the preliminary contract to justify the use of the interest theory at all.

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20. *Id.* at 606.

21. *Cooperman v. Guarantee Abstract Co.*, Ch. No. 37,759, 6th Cir. Fla. 1953; *Cooperman v. West Coast Title Co.*, Ch. No. 37,760, 6th Cir. Fla. 1953.



This is an attempted middle ground approach to the whole problem. Like most of such approaches it falls short of the only adequate solution for public protection, which is one that requires the overall knowledge of the lawyer to be exercised at some stage before completion of a real estate transaction usually involving the expenditure of large sums of money. The overall knowledge of the lawyer is required even to decide whether "further or more complicated details, conditions or terms" should be placed in conveyancing instruments. It should hardly be necessary to comment that a realtor who makes the decision that further or more complicated terms need not be placed in an instrument, whether competent to make such a decision or not, will not call the lawyer into a transaction to impeach his own decision.

This opinion of the court in the St. Petersburg suits is also grounded upon split premises, viz., a limited application of the interest theory and a fallacious assumption that courts which permit realtors to prepare preliminary contracts do so as a "practical adjustment to the realities of making a deal". Actually, the courts permitting the preparation of the preliminary contracts by realtors in deals in which they act as brokers, do so because of the broker's interest in establishing his right to a commission because of the preliminary contract. In addition, the Florida court in the *Keyes* case found authority in the real estate license law to permit such preparation.

The courts, including the Florida court, hold that a realtor's interest in the convenient collection of his commission is not direct enough to permit him to prepare for other persons documents in which he has no real interest. For instance, it has been held in Florida that the interest of a realtor in his commission is not direct enough with the buyer to permit his intervention in a suit for specific performance between the parties he brought together, as his right to a commission is determined entirely from his contract with the seller.<sup>22</sup>

When the realtors become fully awakened to the real import of Judge Wehle's opinion they should not be too comforted by it. There are very few transactions which involve instruments containing merely the date, amounts, names of parties, latest tax year liability and description of the property involved, which was ruled to be the subject of preparation by realtors. It would seem, for instance, under the express language of Judge Wehle's opinion, that if a deed should recite that the property is taken subject to mortgages or subject to restrictions, these terms would have to be prepared or supervised by a lawyer.

#### WHAT REMAINS TO BE DONE

Final decrees have not been entered in the St. Petersburg cases. The Florida Bar and the St. Petersburg Bar Association have filed with Judge Wehle a supplementary brief asking for a reconsideration of his opinion, and in the event that he does not change his decision, a request for clarifica-

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22. *Winkler v. Neilinger*, 153 Fla. 288, 14 So.2d 403 (1943).

tion of the opinion. In the latter, the Bar has asked the court to state definitely if any terms in instruments beyond the dates, amounts, names of the parties, latest tax year liability and description of the property involved must be prepared or supervised by a lawyer. The Bar has also asked the court to state expressly whether instruments other than deeds, purchase money mortgages, mortgage notes, loan mortgages and leases on standard forms may be prepared by realtors. In the request for clarification the lawyers have also asked Judge Wehle to decide whether or not realtors can prepare preliminary agreements to mortgage real or personal property, preliminary agreements to sell or exchange personal property, and the subsequent instruments in such transactions.

In any event the St. Petersburg suits will be taken to the Supreme Court of Florida for a final determination. Since the parties to these suits include individual lawyers, a local bar association, the Florida Bar, individual realtors and the Florida and St. Petersburg Boards of Realtors, it is hoped that the final decision of the Supreme Court of Florida will set at rest the major problems involved in the present controversy.